TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 269.

H. L. HERBERT, PLAINTIFF IN ERROR,

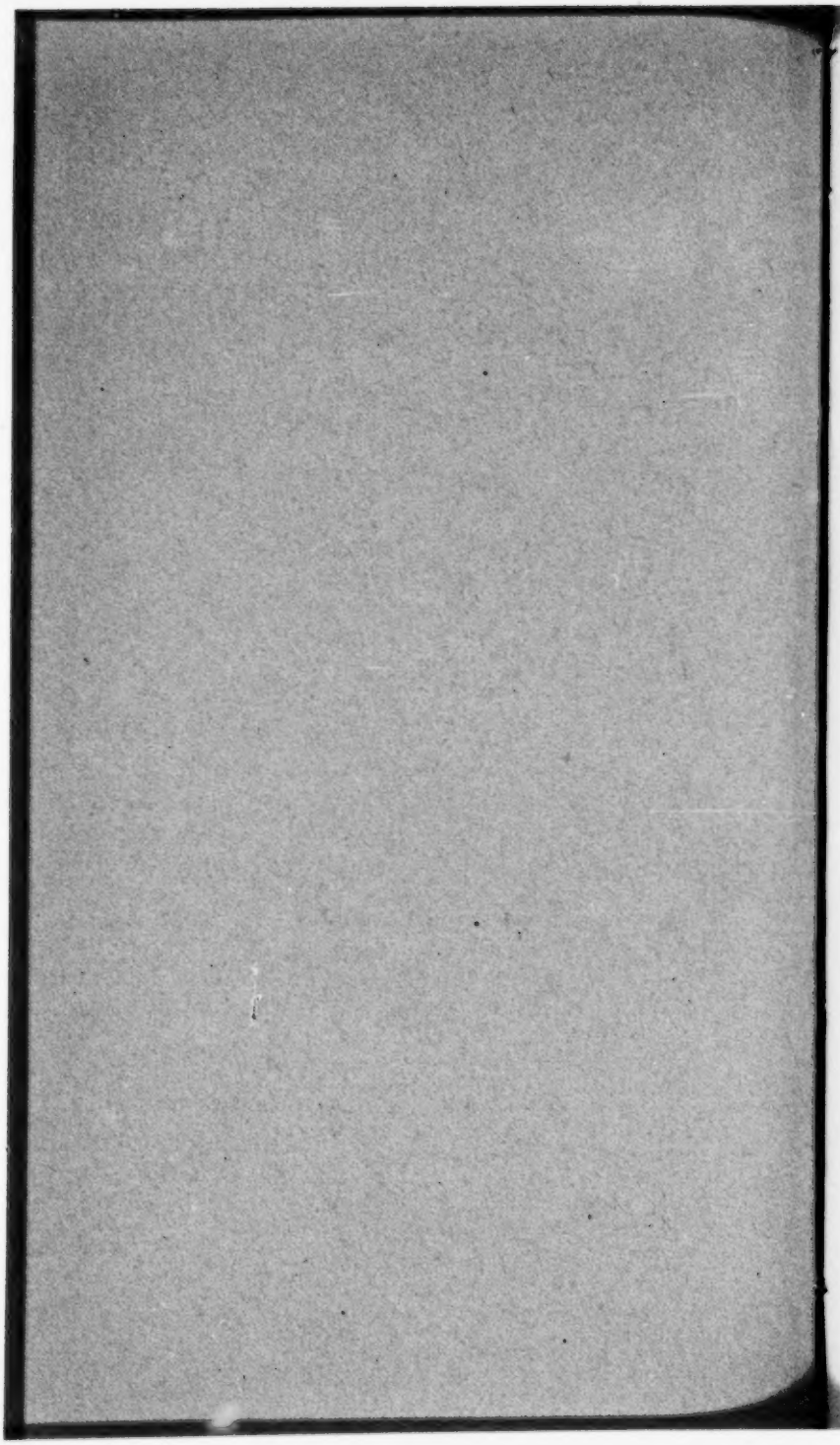
vs.

HENRY BICKNELL, WILLIAM HENRY, AND WILLIAM HENRY, SECRETARY OF THE BENTON G. MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED JUNE 3, 1913.

(23,236)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1914.

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1 In the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

HENRY BICKNELL
v.
H. L. HERBERT, Defendant; WM. HENRY, WM. HENRY as Secretary of Benton G. Mining Co., Garnishees.

Assumpsit.

Plaintiff's Complaint.

Henry Bicknell, the plaintiff herein, of Honolulu, City and County of Honolulu, Territory of Hawaii, claims of H. L. Herbert, the defendant herein, of said Honolulu, the sum of $96 for dental attendance and services rendered and performed by said plaintiff, a duly licensed qualified and acting dentist, to for and on behalf of said defendant at said Honolulu at defendant's request from April to June 30, 1906, for which services defendant promised plaintiff to pay to him when thereunto requested said sum of $96. Plaintiff has requested said defendant to pay said sum of $96, but defendant has failed and neglected to pay the same or any part thereof.

Wherefore plaintiff prays judgment against said defendant for said sum of $96 with interest, costs of court and attorney's commissions.

Plaintiff alleges to the best of his knowledge, information and belief that Wm. Henry & Wm. Henry as Secretary of Benton G. Mining Co., are the attorneys agents factors trustees and debtors of said defendant and have concealed in their possession so that they cannot be levied upon or attached the goods and effects of said defendant, and plaintiff requests the Court issuing summons
2 therein to insert therein a direction to the officer serving the same to leave a true and attested copy thereof with said Wm. Henry, Wm. Henry as Secretary of Benton G. Mining Co., the attorneys, agents, factors, trustees and debtors of said defendant, or at their usual place of abode and to summon said garnishees to appear personally at the time and place named in said summons then and there on oath to disclose whether they have or at the time said copy was served had any of the goods or effects of said defendant in their hands and if so the nature amount and value of the same or whether said garnishees are indebted to said defendant and the nature and amount of said debt.

Dated Honolulu, June 30th, 1909.

HENRY BICKNELL,
(Sgd.) By C. F. PETERSON,
His Attorney.

3 District Court of Honolulu, District, City and County of Honolulu, Territory of Hawaii.

HENRY BICKNELL, Plaintiff,
v.
H. L. HERBERT, Defendant; WM. HENRY and WM. HENRY as Secretary of Benton G. Mining Co., Garnishees.

Garnishee Summons.

THE TERRITORY OF HAWAII:

To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the City and County of Honolulu, or his Deputy; or any Police Officer of the District of Honolulu, City and County of Honolulu, Territory of Hawaii:

You are commanded to summon H. L. Herbert, Defendant if — can be found in this District, to appear before me at my Court Room, in Honolulu on Friday, the 2nd day of July, 1909, at 1:30 o'clock P. M. to show cause why judgment should not be rendered upon the Plaintiff's demand in the above entitled suit, to-wit:

As per complaint attached and hereby made a part hereof.

Wherefore Plaintiff pray- judgment for said amount of $— with costs ——.

Notify said defendant that if he fail to attend at the above named time and place, judgment will be entered against him ex parte, by default.

Plaintiff request- the Court issuing the summons to insert herein a direction to the officer serving the same to leave a true and attested copy thereof with Wm. Henry and Wm. Henry as Secretary Benton G. Mining Co. Garnishees, the attorneys, agents, factors trustees, or debtors of said defendant, or at their usual place of abode, and to summon said Garnishee-, to appear personally at the time and place above named then and there on oath to disclose whether they have, or at the time said copy was served, had any of the goods or effects of said defendant in their hands, and if so, the nature, amount and value of the same, or whether said Garnishee- are indebted to said defendant and the nature and amount of said debt.

You are therefore commanded to leave a true and attested copy thereof with said Garnishee- and to summon them to appear personally at said time and place for the purposes above set forth.

Given under my hand this 30th day of June, 1909.

(Sgd.) FRANK ANDRADE.
District Magistrate of Honolulu, City and County of Honolulu, Territory of Hawaii.

C. F. PETERSON,
For P't'f.

Whensoever any person summoned as an attorney, agent, factor or debtor of any defendant, may be desirous of so doing, he may apply to the Magistrate or any Judge of the Court from whom or which the

said summons may have issued, and the Magistrate or Judge having caused reasonable notice to be given to the plaintiff in the action, shall proceed to take the deposition of the person thus summoned, and make such order as may be proper in the premises, at any time previous to the day appointed for hearing the cause, and the person so summoned as agent, factor, trustee or debtor of the party defendant, shall be taken to have obeyed the summons.—Sec. 2122 Rev. Laws.

[On left margin:] I certify the within Summons to be a true copy of the original on file in said Court. —— ——, —— ——.

[Endorsed:] 5–281. District Court of Honolulu, City and County of Honolulu, Territory of Hawaii. Henry Bicknell vs. H. L. Herbert, Def't; Wm. Henry, &c., Garnishee. Garnishee Summons. Issued at — o'clock — M., —— —, 191–. —— ——. Returned at — o'clock — M., —— —, 191–. —— ——. C. F. Peterson, Attorney for Plaintiff. Deposit $3.00. H. N. Clark, Clerk.

Served the within Summons on —— —— therein named as defendant, by handing him a true and attested copy thereof and at the same time showing him the original, at —— this — day of ——, 191–.

—— ——,
Police Officer.

[Or as follows:]

Served the within Summons on —— —— therein named as defendant, by leaving a true and attested copy thereof at his last and usual place of abode, to-wit, at —— this — day of ——, 191–.

—— ——,
Police Officer.

Or

Served the within Summons on Wm. Henry therein named as garnishee, by leaving with him a true and attested copy thereof at Honolulu, City and County of Honolulu, T. H., this 30 day of June, 1909.

(Sgd.) W. P. JARRETT, *Sheriff.*

Served the within summons on Wm. Henry as Secretary of the Benton G. Mining Co. therein named as Garnishee by leaving with him a true and attested copy thereof at Honolulu, City and County of Honolulu, T. H., this 30th day of June, 1909.

(Sgd.) W. P. JARRETT, *Sheriff.*

4 In the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

HENRY BICKNELL, Plaintiff,
v.
H. L. HERBERT, Defendant, and WILLIAM HENRY, and WILLIAM HENRY as Secretary of Benton G. Mining Company, Garnishees.

Assumpsit.

Notice of Presentation of Motion.

To C. F. Peterson, Attorney for Henry Bicknell, Esq.:

Please take notice that the Motion to Quash Service and to set aside Judgment in this case, already served on you, will be presented to His Honor, Judge Andrade, in the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii, on Wednesday, January 5, 1910, at 1:30 o'clock p. m.

Dated, Honolulu, January 3, 1910.

CASTLE & WITHINGTON,
Attorneys for H. L. Herbert, Defendant.

5 In the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

HENRY BICKNELL, Plaintiff,
v.
H. L. HERBERT, Defendant, and WILLIAM HENRY and WILLIAM HENRY as Secretary of Benton G. Mining Company, Garnishees.

Assumpsit.

Motion to Quash Service and to Set Aside Judgment.

Now comes the defendant, H. L. Herbert, appearing especially for this purpose, by his attorneys, Castle & Withington, and moves to quash service in this action on the defendant and to set aside judgment against the defendant and the judgment against the garnishees, on the following grounds:

(1) That on the face of the record there are not sufficient facts to warrant either a judgment against this defendant or against said garnishees.

(2) That the said judgment against this defendant is erroneous and void, because the record shows that there was not sufficient service upon this defendant to comply with Article XIV of the Amendments to the Constitution of the United States or with the laws of the Territory of Hawaii.

(3) That the said judgment was erroneously and inadvertently taken, in that no service was in fact made upon the defendant, either

personally or at his last and usual place of abode, as provided by the laws of the Territory of Hawaii in regard to service in
6 garnishee proceedings.

(4) That the said judgment, both against the defendant and the garnishees, is void and entered without authority of law. (C. & W.)

This motion will be made upon the papers and record in the action also the papers and records in three separate actions entitled "A. Marques v. H. L. Herbert and William Henry, Secretary, Garnishee," in this court, the affidavit of R. A. Jordan herewith filed, and on the oral evidence of the person making the service.

Dated, Honolulu, December 31, 1909.

H. L. HERBERT,
By His Attorneys, CASTLE & WITHINGTON,
Appearing Specially for the Purpose of This Motion, and Not Otherwise.

7 In the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

HENRY BICKNELL, Plaintiff,
v.
H. L. HERBERT, Defendant, and WILLIAM HENRY and WILLIAM HENRY as Secretary of Benton G. Mining Company, Garnishees.

Assumpsit.

Affidavit of R. A. Jordan.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

R. A. Jordan, being duly sworn, deposes and says: that he is a resident, and has been for many years, of Honolulu, in the Territory of Hawaii, and knows and has known for many years H. L. Herbert, the defendant in this action.

That the said H. L. Herbert is and has been for a considerable time a married man, having a family, and that he left Honolulu with his family for Australia on the "Aorangi" on the 22nd day of August, 1908, intending to make Australia his home, and that he and his family have since been residents of Sidney New South Wales, Australia.

That the said H. L. Herbert returned alone, without his family, on a business trip, on the 7th day of January, 1909, upon the "Aorangi," and went back to Australia by the same steamship on the 7th day of February, 1909, and has not since been within the Territory of Hawaii.

That during the month between the 7th day of January,
8 1909, and the 7th day of February, 1909, the said H. L. Herbert had a room at MRS. Kearns' at 184 South Hotel Street, in said Honolulu, but that his family had never lived or

had their usual place of abode at said Mrs. Kearns' at 184 South Hotel Street: but that the last and usual place of abode of said defendant, H. L. Herbert within this Territory was at Waikiki.

That affiant has examined the record in and action brought by A. Marques against H. L. Herbert and May Herbert, his wife, filed June 22, 1909, in the Circuit Court of the First Circuit, in which C. F. Peterson, Esq., and F. Andrade are the attorneys for plaintiff and in which service was made returned as the last and usual place of abode of the said defendants on the Beach Road near Hobron Lane.

And further affiant saith not.

(Sgd.) R. A. JORDAN.

Subscribed and sworn to before me this 31st day of December, 1909.

(Sgd.) J. HARRIS MACKENZIE,
Notary Public, First Judicial Circuit,
Territory of Hawaii.

9 District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

FRIDAY, *July* 2, 1909.

5—281.

HENRY BICKNELL
v.
H. L. HERBERT, Defendant; WILLIAM HENRY, WILLIAM HENRY, Secretary of Benton G. Mining Company, Garnishees.

Assumpsit, $96.00.

Charles F. Peterson, attorney for plaintiff.

Defendant called. No appearance by or for defendant. Defaulted.

HENRY BICKNELL, sworn: Am dentist. I know defendant. He owes me $96.00 for work done for his 2 daughters, here in Honolulu. I presented him the bill. Some of original bill has been paid. Bill rendered in June.

Judgment for plaintiff for	$96.00
Interest to date from June 30, 1906	23.08
Attorney's commission	10.29
Costs of court	2.20
Police fees	3.00
Total	$134.57

WM. HENRY, sworn: Am Secretary Benton G. Mining Co. At time of service of summons on me there were 40,000 shares of stock sold for Mrs. Herbert and that treasury stock would go with that sale. There was $458.00 paid on acct. of stock. The stock was worth from 10—15 to 20 cents. I consider that it will be worth $1.00 a share. I hold $1,290 in my possession, of that stock. Defendant sold his shares out before. We hold treasury stock yet, of 4,000 shares, $4,000, treasury stock. Mr. Emmeluth testified that he would pay 20 cents a share, 15 cents a share is low enough. I consider it worth 15 cents a share. At 15 cents a share I have enough to pay this claim.

The garnishee is ordered to hold and pay unto the plaintiff the above amount of judgment, including costs, interest and attorney's commission.

District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

AUGUSTUS MARQUES, Plaintiff,

vs.

H. L. HERBERT, Defendant; WM. HENRY, WM. HENRY, as Secretary of Benton G. Mining Co., and T. J. Ryan, Trustees, Garnishees.

Plaintiff's Complaint.

Augustus Marques, the plaintiff herein, of Honolulu, City and County of Honolulu, Territory of Hawaii, claims of H. L. Herbert, the defendant herein, of said Honolulu, the sum of $80.62 with interest thereon, being balance due of $100. of money loaned and advanced by plaintiff to said defendant at defendant's request at said Honolulu on September 18, 1907, which sum defendant promised to pay to him on demand with interest at 6% per annum as per promis-ory note of said defendant, a copy whereof marked Exhibit A is hereto annexed and is hereby made a part hereof.

That plaintiff has repeatedly demanded payment of said note from defendant but defendant has failed and neglected to pay the same or any part thereof save and except the sum of $25. paid on account on August 25, 1908.

Wherefore plaintiff prays judgment for said sum of $80.62 together with interest costs of court and attorney's commissions.

And the plaintiff further says that he is informed and believes and upon such information and belief alleges that the goods and effects of said defendant are concealed in the hands of Wm. Henry, Wm. Henry as Secretary of Benton G. Mining Co., and T. J. Ryan, Trustee, the attroenys agents factors trustees of said defendant so that they cannot be found to be attached or levcied upon, and plaintiff is informed and believes and upon such information and belief alleges that debts are due from Wm. Henry, Wm. Henry as Secretary of Benton G. Mining Co., and T. J. Ryan, Trustee, to said defendant; and plaintiff requests the court issuing summons herein to insert therein a direction to the officer serving the same

to leave a true and attested copy thereof with said Wm. Henry, Wm. Henry as Secretary of Benton G. Mining Co., and T. J. Ryan, Trustee, Garnishees, the attorneys agen-s factors trustees and debtors of said defendant, or at their usual place of abode and summon them, said garnishees to appear personally at the time and place named in said summons then and there on oath to disclose whether they have or at the time said copy was served had any goods or effects of said defendant in their hands and if so the nature amount and value of the same or whether said garnishees are or at the time of such service were indebted to said defendant, and the nature and amount of said debt.

Dated Honolulu, June 23, 1909.

AUGUSTUS MARQUES,
By C. F. PETERSON,
His Attorney.

EXHIBIT A.

$100.00. HONOLULU, *September* 18, 1907.

On presentation after date we promise to pay to the order of Augustus Marques of Honolulu the sum of One Hundred dollars at — Value received with interest at 6% per annum. No. 3 Due on Demand.

H. L. *BERBERT.*"

Endorsed: "Paid on account Twenty-five Dollars August 25, 19*0*8, 8 A. M."

12 District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

AUGUSTUS MARQUES, Plaintiff,
v.
H. L. HERBERT, Defendant; WM. HENRY, WM. HENRY, as Secretary of Benton G. Mining Co., and T. J. Ryan, Trustee, Garnishees.

Garnishee Summons.

THE TERRITORY OF HAWAII:

To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the City and County of Honolulu, or his Deputy; or any Police Officer of the District of Honolulu, City and County of Honolulu, Territory of Hawaii:

You are commanded to summon H. L. Herbert Defendant if he can be found in this District, to appear before me at my Court Room, in Honolulu on Friday, the 25th day of June 1909, at 1:30 o'clock P. M. to show cause why judgment should not be rendered upon the Plaintiff- demand in the above entitled suit, to-wit:

As per complaint attached and hereby made a part hereof.

Wherefore plaintiff pray- judgment for said amount of $—— with costs ——.

Notify said defendant that if he fail- to attend at the above named time and place, judgment will be entered against him ex parte, by default.

Plaintiff requested the Court issuing the summons to insert herein a direction to the officer serving the same to leave a true and attested copy thereof with Wm. Henry, Wm. Henry as Secretary of Benton G. Mining Co., and T. J. Ryan, Trustee, Garnishee, the attorneys, agents, factors, trustees, or debtors of said defendant, or at their usual place of abode, and to summon said Garnishee, to appear personally at the time and place above named then and there on oath to disclose whether they have, or at the time said copy was served, had any of the goods or effects of said defendant in their hands, and if so, the nature, amount and value of the same, or whether said Garnishee — indebted to said defendant and the nature and amount of said debt.

You are therefore commanded to leave a true and attested copy thereof with said Garnishee- and to summon them to appear personally at said time and place for the purposes above set forth.

Given under my hand this 23rd day of June 1909.

(Sgd.) CARLOS A. LONG,
District Magistrate of Honolulu, City and County of Honolulu, Territory of Hawaii.

C. F. PETERSON,
Attorney for Pl'f.

Whensoever any person summoned as an attorney, agent, factor or debtor of any defendant, may be desirous of so doing, he may apply to the Magistrate or any Judge of the Court from whom or which the said summons may have issued, and the Magistrate or Judge having caused reasonable notice to be given to the plaintiff in the action, shall proceed to take the deposition of the person thus summoned, and make such order as may be proper in the premises, at any time previous to the day appointed for hearing the cause, and the person so summoned as agent, factor, trustee or debtor of the party defendant, shall be taken to have obeyed the summons.—Sec. 2122 Rev. Laws.

[On left margin:]
I certify the within Summons to be a true copy of the original on file in said Court.

____ ____.
____ ____.

Served the within summons on H. L. Herbert therein named as defendant by leaving a true and attested copy thereof at his last and usual place of abode, to: at # 1475 Ala Moana Road in Honolulu, City and County of Honolulu, Territory of Hawaii this 24th day of June, A. D. 1909.

(Sgd.) J. S. KALAKIELA,
Police Officer.

2—269

Or

Served the within summons on Wm. Henry, Wm. Henry as Secretary Benton G. Mining Co., therein named as garnishees, by leaving with him true and attested copies thereof at Honolulu, City and County of Honolulu, Territory of Hawaii, this 24th day of June, A. D. 1909.

(Sgd.) J. S. KALAKIELA,
Police Officer.

[Endorsed:] 5-274. District Court of Honolulu, City and County of Honolulu, Territory of Hawaii. Augustus Marques vs. H. L. Herbert, Def't., Wm. Henry et al. Garnishees. Garnishee Summons. Issued at — o'clock — M., —— —, 191-. —— ——. Returned at — o'clock, — M., —— —, 191-. —— ——. Dep. $3.00. H. N. Clark, Clerk. C. F. Peterson, Attorney for Plaintiff.

13 District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

FRIDAY, *June* 25, 1909.

AUGUSTUS MARQUES
v.
H. L. HERBERT, Defendant; WILLIAM HENRY, WILLIAM HENRY, as Secretary of Benton G. Mining Company, and T. J. Ryan, Trustee, Garnishees.

Assumpsit, $80.62.

Balance Due on Promissory Note.

Charles F. Peterson, Attorney for Plaintiff.

Defendant called. No appearance by or for Defendant. Defaulted.

AUGUST MARQUES, Sworn: I know defendant. He owes me money. This is promissory note for $100.00 for money loaned to him. Note was signed on September 18, 1907. On August 25, 1908, he paid $25.00. Balance due and unpaid. Made demand. (Note offered in Evidence.)

J. EMMELUTH, sworn: I am acquainted with value of Benton G. Mining Company. I would not sell any stock of mine for 15 cents. It is worth 20 cents with a running salary.

Judgment for Plaintiff for	$80.62
Interest to date	4.05
Attorney's Commission	8.46
Costs of Court	2.30
Police Fees	3.00
	$98.43

Agreed that Order against the garnishee in the preceding case be submitted to apply to this case.

The garnishee ordered to pay the plaintiff or his attorney the sum of $98.43.

14 *Transcript of Record In re Motion to Reopen Default and Set Aside Judgment.*

District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

WEDNESDAY, *January* 5, 1910.

HENRY BICKNELL

v.

H. L. HERBERT, Defendant; WM. HENRY and WILLIAM HENRY, Secretary, Garnishees.

Motion to Reopen Default and Set Aside Judgment.

Charles F. Peterson, attorney, appearing specially for the plaintiff.

Mr. Castle, appearing for the Defendant.

Argument on Motion.

Plaintiff questions authority of counsel in appearing in this matter.

Taken under advisement until January 7, 1910.

FRIDAY, *January* 7, 1910.

From January 5, 1910.

HENRY BICKNELL

v.

H. L. HERBERT, Defendant; WM. HENRY, etc., Garnishee.

Continued to January 10, 1910.

MONDAY, *January* 10, 1910.

15 From January 7, 1910.

HENRY BICKNELL

v.

H. L. HERBERT, Defendant; WM. HENRY, Garnishee.

Chas. F. Peterson, attorney for plaintiff.

Castle & Withington, for defendant.

Ruling.

Defendant's motion as a whole denied.
Costs, $1.70.

16 In the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

HENRY BICKNELL, Plaintiff,
v.
H. L. HERBERT, Defendant, and WILLIAM HENRY, and WILLIAM HENRY, Secretary of Benton G. Mining Company, Garnishees.

(Stamp $1.00.)

Assumpsit.

Bond on Appeal.

Know all men by these presents: That we, H. L. Herbert as Principal and A. N. Campbell as Surety, are held and firmly bound unto Henry Smith, Clerk of the Judiciary Department, and to his successors in office in the sum of Twenty Dollars ($20) to the payment of which well and truly to be made, we herewith bind ourselves, our executors and administrators by these presents.

The condition of this obligation is as follows:

Whereas, the said H. L. Herbert has appealed from a decision of the District Magistrate of Honolulu rendered the 10th day of January, A. D. 1910, in the above entitled suit to the Supreme Court of this Territory.

Now therefore, if the said H. L. Herbert shall pay or cause to be paid all costs to accrue in case he is defeated in said appellate court, then this obligation shall be void.

In witness whereof the said parties have hereunto set their hands and seals this 13th day of January, A. D. 1910.

H. L. HERBERT,
By CASTLE & WITHINGTON,
His Attorneys, Principal.
A. N. CAMPBELL, *Surety.*

17 Endorsed: Original. No. —. District Court of Honolulu City and County of Honolulu, Territory of Hawaii. Henry Bicknell, Plaintiff, vs. H. L. Herbert, Defendant, William Henry et al., Garnishees. Bond on Appeal. Filed January 19, 1910. B. P. Zablan, Clerk. Castle & Withington, Attorneys for Defendant.

18 *Certificate.*

I, Frank Andrade, District Magistrate of Honolulu, City and County of Honolulu, Territory of Hawaii, do hereby certify that the following documents hereinunder enumerated:

(1) Copy of summons with copy of returns thereon made, in re Henry Bicknell v. H. L. Herbert, etc.,
(2) Copy of "Notice of Presentation of Motion,"

(3) Copy of "Motion to Quash Service and to Set Aside Judgment" with copy of "Affidavit of R. A. Jordan."
(4) Transcript of Evidence in re Henry Bicknell vs. H. L. Herbert, etc.,
(5) Copy of Summons with copy of Returns thereon, in re Augustus Marques v. H. L. Herbert, etc.,
(6) Transcript of Evidence in re Augustus Marques v. H. L. Herbert, etc., and
(7) Transcript of Record in Re Motion to Reopen Default and set aside Judgment,

are full, true and correct copies of the original summons, documents, motions and records now on file in the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

Dated Honolulu, February 8, 1910.

(S'g'd) FRANK ANDRADE,
District Magistrate of Honolulu, City and County of Honolulu, Territory of Hawaii.

19 In the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

HENRY BICKNELL, Plaintiff,
v.
H. L. HERBERT, Defendant, and WILLIAM HENRY, and WILLIAM HENRY, Secretary of Benton G. Mining Company, Garnishees.

Assumpsit.

Points of Law on Behalf of the Defendant, H. L. Herbert.

The defendant, H. L. Herbert, appeals to the Supreme Court of this Territory on the following points of law:

(1) That on the face of the record in the above entitled action there are not sufficient facts to warrant either a judgment against this defendant or against said garnishees.

(2) That the said judgment against this defendant is erroneous and void, because the record in the above entitled action shows that there was not sufficient service upon this defendant to comply with Article XIV of the Amendments to the Constitution of the United States or with the laws of the Territory of Hawaii.

(3) That the said judgment was erroneously and inadvertently taken, in that no service was in fact made upon the defendant, either personally or at his last and usual place of abode, as provided by the laws of the Territory of Hawaii in regard to service in garnishee proceedings.

20 (4) That the said judgment, both against the defendant and the garnishees, is void.

Dated, Honolulu, January 13, A. D. 1910.

H. L. HERBERT, *Defendant*,
(S.) By His Attorneys, CASTLE & WITHINGTON.

Endorsed: Original. No. —. District Court of Honolulu, City and County of Honolulu, Territory of Hawaii. Henry Bicknell, Plaintiff, vs. H. L. Herbert, Defendant, and William —— et al., Garnishees. Points of Law on Behalf of the Defendant, H. L. Herbert. Filed January 15, 1910. Castle & Withington, Attorneys for Defendant.

21 District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

HENRY BICKNELL, Plaintiff,

v.

H. L. HERBERT, Defendant; WM. HENRY, and WM. HENRY as Secretary of Benton G. Mining Company, Garnishee-.

Notice and Certificate of Appeal.

I hereby certify that on the 10th day of January 1910 in the above entitled cause, I Denied and Overruled Defendant's Motion as a whole, Costs $1.70, and that an appeal from said judgment ruling was duly noted by defendant to Supreme Court of the Territory of Hawaii, on points of law, hereto attached and made a part of this notice and certificate, and that said appeal has since been duly perfected.

A full and correct copies of my records in said case is hereto attached, together with copies of original summons with copies of returns thereon, & copies of original motions and transcripts of evidence.

Given under my hand this 8th day of February, 1910.

(S.) FRANK ANDRADE.
District Magistrate of Honolulu, City and County of Honolulu.

Memorandum of Costs.

Costs of Court, paid by defendant	$1.70
Costs of Certificate of Appeal	1.10
Total sent up herewith	$2.80

22 Endorsements: Note: Magistrates will do well, at the time of rendering judgment, to cause the annexed notice to be signed by the losing party, whether the appeal will be perfected or not. If the appeal is not perfected the certificate will not be signed or used. See Section 1858 Rev. Laws.

District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

HENRY BICKNELL, Pl.,
vs.
H. L. HERBERT, Def't, and WILLIAM HENRY, and WILLIAM HENRY, Secretary of Benton Mining Company, Garnishees.

The Defendant in this case appeals from the judgment herein to the Supreme Court of the Territory of Hawaii on points of law hereto attached.

Dated January 13, 1910.

H. L. HERBERT,
By CASTLE & WITHINGTON,
Attorneys for Defendant.

Filed January 13, 1910.
B. P. ZABLAN, *Clerk.*

Perfected Jan. 19, 1910.
B. P. ZABLAN, *Clerk.*

No. 487. Supreme Court Territory of Hawaii. Henry Bicknell, Plaintiff vs. H. L. Herbert, Defendant. Wm. Henry, and Wm. Henry, Secretary Benton G. Mining Company, Garnishees. Notice of Appeal, Certificate and Record from District Magistrate of Honolulu, City and County of Honolulu. Received $2.80. Filed March 9, 1910, 11:40 A. M. J. A. Thompson, Clerk.

23 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

HENRY BICKNELL
v.
H. L. HERBERT, Defendant; WM. HENRY, WM. HENRY, as Secretary of Benton G. Mining Co., Garnishees.

Appeal from District Magistrate of Honolulu.

Argued April 6, 1910. Decided April 14, 1910.

Hartwell, C. J.; Perry and De Bolt, JJ.

Judgment—motion to set aside.

Sufficiency of evidence to support a finding by a district magistrate cannot be inquired into on a motion to set aside judgment made six months after judgment.

Process—service by publication.

Act 34, S. L. 1909, relating to service by publication, does not apply to district courts.

Process—substituted service—leaving at last place of abode.

A and his family occupied a dwelling at Waikiki, Honolulu, and then left the Territory with intention of abandoning his residence in Hawaii and establishing a home in Australia. Subsequently he returned to Honolulu on business, remaining one month and occupying a room at 184 S. Hotel street. Held, the latter was his "last and usual place of abode" within the meaning of R. L., Sec. 2114.

Constitutional law—due process of law—substituted service.

The provision of R. L., Sec. 2114, for service on the principal defendant by leaving a copy of the summons at his last and usual place of abode meets the requirement of the Constitution as to due process of law.

24 *Opinion of the Court by Perry, J.*

This is an action of assumpsit instituted in the district court of Honolulu for $96 and interest, attorneys' commissions and costs. The declaration was dated June 30, 1909, and summons was issued the same day returnable July 2, 1909. Service of the summons was made on William Henry personally and as secretary of the Benton G. Mining Company, garnishee, on June 30, 1909. No personal service was made on the principal defendant, who at that time was without the Territory of Hawaii; nor was there any service on him by publication. The only service which was made on the principal defendant was by leaving a copy of the summons at his last and usual place of abode. At the trial no appearance was made of or for the defendant. On July 2, the testimony of plaintiff and of William Henry having been received, judgment was rendered for the plaintiff against the defendant and the garnishee in the sum of $134.57. No appeal was taken or writ of error sued out to review the correctness of the judgment. On December 31, 1909, the principal defendant, appearing specially for the purpose by Messrs. Castle & Withington as his attorneys, presented a motion to quash service and to set aside the judgment on the grounds: "(1) that on the face of the record there are not sufficient facts to warrant either a judgment against this defendant or against said garnishees; (2) that the said judgment against this defendant is erroneous and void, because the record shows that there was not sufficient service upon this defendant to comply with Article XIV of the Amendments to the Constitution of the United States or with the laws of the Territory of Hawaii; (3) that the said judgment was erroneously and inadvertently taken, in that no service was in fact made upon the defendant, either personally or at his last and usual place of abode, as provided by the laws of the Territory of Hawaii in regard to service in garnishee proceedings; and (4) that the said judgment, both against the defendant and the garnishees, is void and entered without authority of law."

25 The motion was based upon the records in this and three other actions brought against the same defendant and the same garnishee and upon the affidavit of one R. A. Jordan. At the hearing of the motion the plaintiff, also "appearing specially," chal-

lenged the authority of Messrs. Castle & Withington to appear for the defendant. The record is silent as to what proceedings, if any, were had with reference to this challenge. Subsequently the magistrate "denied defendant's motion as a whole." From that ruling defendant appealed to this court on points of law, the points being substantially those stated in the motion to quash.

In view of our conclusion on the other issues it is unnecessary to pass upon the question of counsel's authority to appear. It may be assumed in the defendant's favor that Messrs. Castle & Withington had the requisite authority.

Whether the evidence adduced was sufficient in law to support the judgment against the garnishee is a question which cannot be raised by the motion to set aside the judgment presented six months after judgment. At least two methods were open to defendant for obtaining a review of the finding against the garnishee, that is, by appeal and by writ of error. It may be added, although perhaps it is not material, that at the date of the filing of the motion to set aside the judgment the time for suing out a writ of error had not expired.

Sec. 2114 of the Revised Laws, after prescribing the method of bringing the garnishee before the court, provides that "such notice" (summons) "shall be sufficient notice to the defendant to enable the plaintiff to bring his action to trial unless the defendant be an inhabitant of this Territory or has some time resided therein, and then a like copy shall be served personally upon him or left at his last or usual place of abode." Service on the defendant was made under this section. It is now contended on his behalf that
26 it should have been made under Act 34 of the Laws of 1909, amending Sec. 1723 of the Revised Laws and reading as follows:

"If the defendant was never an inhabitant of the Territory or has removed therefrom, or if after due diligence he cannot be found within the Territory of Hawaii and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof at Chambers, and it shall in like manner appear that a cause of action exists against such defendant or that he is a necessary or proper party to the action, and that such defendant has property situated within the Territory of Hawaii, such court or judge may grant an order that the service be made by publication of the summons."

Sec. 1723 R. L., as thus amended does not in our opinion apply to proceedings before district magistrates. The language used concerning "the court or a judge thereof at chambers" would be inappropriate if used with reference to district courts. District magistrates do not under our statutes sit "at chambers." It is Sec. 2114 that applies in such cases as that at bar.

The officer's return of the service made on the defendant was as follows: "Due and diligent search has been made for the within named H. L. Herbert, defendant, within the district of Honolulu, city and county of Honolulu, T. H., and he cannot be found. Upon information received said H. L. Herbert is now without the Territory of Hawaii. I therefore served defendant herein by leaving a true and attested copy thereof at his last and usual place of abode,

to wit, at Mrs. Kearns', 184 S. Hotel street, Honolulu, this 2d day of July, 1909." On defendant's behalf it is contended that 184 S. Hotel street was not in truth the "last and usual place of abode" of the defendant, and in support of this contention reliance is had upon the affidavit of R. A. Jordan. If the correctness of an officer's return may be attacked at the time and in the manner in which this return is attacked, as to which no opinion is expressed, there is nothing in the affidavit to contradict the return. Jordan deposes that defendant is a married man with a family; that with his family he left Honolulu for Australia on August 22, 1908, "intending to make Australia his home;' that defendant and his family "have since been residents of Sydney, N. S. W., Australia;" that defendant "returned alone, without his family, on a business trip," on January
27 7, 1909, again leaving Honolulu for Australia on February 7, 1909, and has not since been within the Territory of Hawaii; that from January 7, 1909, to February 7, 1909, defendant "had a room at Mrs. Kearns, at 184 S. Hotel street in said Honolulu, but that his family had never lived or had their usual place of abode at said Mrs. Kearns' at 184 S. Hotel street, but that the last and usual place of abode of said defendant within this Territory was at Waikiki." A place of abode within the meaning of Sec. 2114 is something less permanent with reference to its occupancy than a place of residence or a domicile. The latter terms as sometimes used in statutes signify a fixed home accompanied by an intention to remain for an indefinite time; but it is possible for one to have for a limited time a place of abode separate and distinct from his permanent residence or domicile. Upon the facts stated in the affidavit, the residence at Waikiki was wholly abandoned when defendant and his family departed for Australia, and when during the whole of the time of his subsequent visit to Honolulu the defendant occupied a room at 184 S. Hotel street, the latter became his last and usual place of abode. The requirements of Sec. 2114 were sufficiently complied with.

The summons was made returnable two days after the date of its issuance and in that respect complied with the requirements of R. L. Sec. 1705, that "All original writs shall be returnable not less than one nor more than six days from the date of issue."

The defendant's main contention is that the service prescribed by Sec. 2114 is not sufficient to meet the requirements of Article 14 (Article 5, perhaps, was intended) of the amendments to the constitution, securing to all persons "due process of law" in the taking of property. Notice and an opportunity to be heard are, of course, of the essentials of due process of law. When a judgment purely in personam is sought, personal service upon the defendant is indispensable; but when the proceeding is in rem or quasi in rem substituted service will suffice. A garnishment such as that in the case
28 at bar, where the object sought is to apply the property of the defendant, to wit, the debt due to him by a third party, to the satisfaction of his debt to the plaintiff, is a proceeding quasi in rem within the meaning of this rule. The state has the power to subject the property of a defendant, non-resident though he be, to the pay-

ment of debts due to its citizens, and in the exercise of that power "substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." Pennoyer v. Neff, 95 U. S. 714, 727. Leaving a copy of the summons at the last and usual place of abode of the defendant is one of the modes of service authorized by our law and is a mode prescribed by the statutes in many of the states and has long been deemed to be well calculated to give to a party alive to the protection of his property and to the performance of his duties notice of the institution of the proceeding against him. Notice by publication is, perhaps, a method more often used as a substitute for personal service, but there is no distinction in principle between the one method and the other. Neither is based on the theory that it will necessarily give actual notice to the defendant but merely that it will give such notice to himself or to his agents if he cares to take reasonable precautions for the protection of his property. A non-resident leaving credits or other property within the jurisdiction is charged with a knowledge of the law as to what the procedure will be when the state attempts to apply those credits or that property to the payment of his debts.

29 On this general subject see also Cooper v. Reynolds, 10 Wall. 308, 317, 318, 319; Earle v. McVeigh, 91 U. S. 503, 504; Huling v. Kaw Valley Railway, 130 U. S. 559, 563, 564; Arndt v. Griggs, 134 U. S. 316, 321; Dewey v. Desmoines, 173 U. S. 193, 203; Hartzell v. Vigen, 6 N. D. 117, 130, 131; Paper Company v. Shyer, 108 Tenn. 444, 451, et seq.; Douglas v. Insurance Co., 33 N. E. 938, 939, 940; The Mary, 9 Cr. 126; Dillen v. Heller, 39 Kans. 599; Matter of the Empire City Bank, 18 N. Y. 199, 215, 216; Journey v. Dickerson, 21 Ia. 308, 311, 312; and Byrne v. Allen, 10 Haw. 668.

In our opinion the service provided for by Sec. 2114 meets the requirements of due process of law.

The judgment denying the motion is affirmed.

(Signed) ALFRED S. HARTWELL.
(Signed) ANTONIO PERRY.
(Signed) JOHN T. DE BOLT.

C. F. Peterson for plaintiff.
Castle & Withington for defendant.

Endorsed: No. 487. Supreme Court, Territory of Hawaii. October Term, 1909. Henry Bicknell v. H. L. Herbert, Defendant, Wm. Henry; Wm. Henry, as Secretary of Benton G. Mining Co., Garnishees. Opinion. Filed April 14, 1910, at 2:37 P. M. J. A. Thompson, Clerk.

30 In the Supreme Court of the Territory of Hawaii.

HENRY BICKNELL, Plaintiff,
v.
H. L. HERBERT, Defendant; WILLIAM HENRY and WILLIAM HENRY as Secretary of Benton G. Mining Company, Garnishees.

Appeal from District Court of Honolulu.

Judgment.

In the above entitled cause it is hereby ordered and adjudged that the judgment of the District Magistrate of Honolulu, dated January 10, 1910, denying the motion to quash service and to set aside the judgment is affirmed.

Dated at Honolulu this 10th day of April, 1912.

By the Court:

[SEAL.] (Signed) J. A. THOMPSON,
Clerk Supreme Court.

O. K.
R.

Endorsed: No. 487. Supreme Court, Territory of Hawaii. Henry Bicknell, Plaintiff, vs. H. L. Herbert, Defendant, William Henry and William Henry, as Secretary of Benton G. Mining Co., Garnishees. Judgment. Filed April 10, 1912. 11:25 A. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for —.

31 In the Supreme Court of the United States.

H. L. HERBERT, Plaintiff in Error,
v.
HENRY BICKNELL, WILLIAM HENRY, and WILLIAM HENRY, Secretary of the Benton G. Mining Company, Defendants.

Petition for Writ of Error to the Supreme Court of Hawaii.

To the Supreme Court of the United States:

The petition of H. L. Herbert, a resident of Sydney, N. S. W., in the Commonwealth of Australia, defendant in a certain action brought by Henry Bicknell against the said H. L. Herbert, in which William Henry and William Henry as Secretary of the Benton G. Mining Company were summoned as garnishees, in the District Court of the District of Honolulu, City and County of Honolulu, Territory of Hawaii, in which, on the 2nd day of July, 1909, a judgment was rendered against the said H. L. Herbert and in favor of Henry Bicknell, and against the said William Henry and William Henry as Secretary of the Benton G. Mining Company, garnishees, respectfully shows to this court:

That on December 31, 1909, the said H. L. Herbert presented in said District Court of Honolulu his motion to quash service and to set aside the judgment; which said District Court, on January 10, 1910, entered its judgment denying the motion.

That a judgment affirming the said judgment of the said District Court denying the motion to quash service and set aside the judgment was rendered herein by the Supreme Court of the Territory of Hawaii on the 10th day of April, 1912.

32 That the said Supreme Court of the Territory of Hawaii is the highest court of said Territory in which decision in this action could be had.

That in the said action rights, privileges and immunities were claimed by your petitioner under the Constitution and Statutes of the United States, and the decision of said Supreme Court of the Territory of Hawaii was against the rights, privileges and immunities especially set up and claimed under said Constituton and Statutes.

Your petitioner, therefore, desires to avail himself of the law and practice in such case made and provided by a writ of error from the Supreme Court of the United States, and prays that the said writ may be allowed.

Dated, Honolulu, T. H., April 10, 1912.

(S'g'd) DAVID L. WITHINGTON,
Of Counsel.

Endorsed: Rec'd & Filed April 10, 1912, at 11:30 o'clock A. M. J. A. Thompson, Clerk.

33 In the Supreme Court of the United States.

H. L. HERBERT, Plaintiff in Error,
v.
HENRY BICKNELL, WILLIAM HENRY, and WILLIAM HENRY, Secretary of the Benton G. Mining Company, Defendants.

Assignments of Error.

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Supreme Court of the Territory of Hawaii erred, to the grievous injury and wrong of the plaintiff herein and against the rights of the plaintiff in error, in the following particulars, to wit:

1st. That the Supreme Court of the Territory of Hawaii erred in holding that the service prescribed by Section 2114 of the Revised Laws of the Territory of Hawaii, as construed by said court, is sufficient to meet the requirements of Article XIV of the Amendments to the Constitution securing to all persons due process of law in the taking of property.

2nd. That the Supreme Court of the Territory of Hawaii erred in holding that the service prescribed by Section 2114 of the Revised

Laws of the Territory of Hawaii, as construed by the court, is sufficient to meet the requirements of Article V of the Amendments to the Constitution securing to all persons due process of law in the taking of property.

3rd. That the Supreme Court of the Territory of Hawaii erred in holding that a service by leaving a copy of the summons at a boarding house, where the defendant, who, with his family, lived in Australia, had stopped temporarily, was due process of law under
34 which a judgment could be obtained, garnisheeing the debts due said defendants from the garnishees.

4th. That the Supreme Court of the Territory of Hawaii erred in holding that service on the defendant domiciled in Australia by leaving a copy at a boarding house where he had stopped temporarily when last in the County of Hawaii, on the same day on which judgment was rendered against him and said debtors, who had been garnisheed, was due process of law and not violative of either the 5th or 14th amendment of the Constitution of the United States.

Dated, Honolulu, T. H., April 10, 1912.

DAVID L. WITHINGTON,
Attorney for Plaintiff in Error.

[Endorsed:] Rec'd & Filed April 10, 1912, at 11:30 o'clock A. M. J. A. Thompson, Clerk.

35 Know all men by these presents: That we, H. L. Herbert, as Principal, and Albert N. Campbell, as Surety, are held and firmly bound unto Henry Bicknell, William Henry, and William Henry, Secretary of the Benton G. Mining Company, in the full and just sum of Five Hundred Dollars ($500) to be paid to the said Henry Bicknell, William Henry, and William Henry, Secretary of the Benton G. Mining Company, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 10th day of April, in the year of our Lord one thousand nine hundred twelve.

Whereas, lately at a Supreme Court of the Territory of Hawaii in a suit depending in said court between H. L. Herbert, plaintiff in error, and Henry Bicknell, William Henry, and William Henry, Secretary of the Benton G. Mining Company, defendants in error, a judgment was rendered against the said H. L. Herbert, plaintiff in error, and the said H. L. Herbert, plaintiff in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Henry Bicknell, William Henry, and William Henry, Secretary of the Benton G. Mining Company, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden in Washington, within sixty (60) days from the date hereof.

Now, the condition of the above obligation is such that if the said H. L. Herbert, plaintiff in error, shall prosecute said writ of error

to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

H. L. HERBERT,
(S.) By CASTLE & WITHINGTON,
His Attorneys.
(S.) ALBERT N. CAMPBELL, *Surety.*

Approved by:
(S.) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

[SEAL.]

Endorsed: Rec'd & Filed April 10, 1912, at 11:30 o'clock A. M. J. A. Thompson, Clerk.

36 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, between H. L. Herbert, plaintiff in error, and Henry Bicknell, defendant, and William Henry, and William Henry, Secretary of the Benton G. Mining Company, garnishees, a manifest error hath happened, to the great damage of the said H. L. Herbert, plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty (60) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred twelve.

[Seal Supreme Court, Territory of Hawaii.]

J. A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

Allowed by:
A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

[Endorsed:] Filed and Issued April 10, 1912, at 11:30 a. m. J. A. Thompson, Clerk. Returned April 11, 1912, at 11:40 a. m. J. A. Thompson, Clerk.

37 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

To Henry Bicknell, William Henry, and William Henry, Secretary of the Benton G. Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein H. L. Herbert is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said H. L. Herbert in said writ mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. G. M. Robertson, Chief Justice of the Supreme Court of the Territory of Hawaii, this 10th day of April in the year of our Lord one thousand nine hundred twelve.

[Seal Supreme Court, Territory of Hawaii.]

A. G M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of a copy of the within citation upon me is hereby admitted this — day of April, 1912.

—— ——.

[Endorsed:] Filed and issued for service April 10, 1912 at 11:30 a. m. J. A. Thompson, Clerk. Returned April 11, 1912 at 11:40 a. m. J. A. Thompson, Clerk.

Served the within Citation on writ of error and writ of error, on Henry Bicknell, William Henry and William Henry, Secretary of the Benton G. Mining Company, therein named as Defendants in error, at Honolulu, City and County of Honolulu, Territory of Hawaii, by delivering to each of them certified copies thereof and of the Petition for writ of error and assignments of error annexed hereto and at the same time showing to each of them the original, this 10th day of April, A. D. 1912.

CHARLES H. ROSE,
Deputy Sheriff of the District of Honolulu, City and County of Honolulu, Territory of Hawaii.

38 In the Supreme Court of the Territory of Hawaii.

No. 487.

H. L. HERBERT, Plaintiff in Error,
vs.
HENRY BICKNELL, WILLIAM HENRY, and WILLIAM HENRY, Secretary of the Benton G. Mining Company, Defendants in Error.

Certificate of Clerk to Transcript of Record.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the commands of the within Writ of Error, the original whereof is herewith returned, (being page 36 of the foregoing transcript), do hereby transmit to the Supreme Court of the United States the foregoing transcript of record, (being pages from 1 to 30 both inclusive) and I do certify the same to be full, true and correct transcript of the record and proceedings had in said Supreme Court of the Territory of Hawaii in the case entitled in said Court, "Henry Bicknell, Plaintiff, versus H. L. Herbert, Defendant, William Henry and William Henry as Secretary of Benton G. Mining Company, Garnishees:"

I do further certify that the foregoing pages numbered 31 and 32 and page 35, are full true and correct copies of the "Petition for Writ of Error," and "Bond on Writ of Error;" and that the original "Assignments of Error," (being pages 33 and 34) and the original "Citation to defendants in error with the return of service thereof) being page 37 of said transcript of record are hereto attached and herewith returned.

In testimony whereof I have caused the Seal of said Supreme Court of the Territory of Hawaii to be hereunto affixed, at Honolulu, City and County of Honolulu, in said Territory, this Twenty First day of May, A. D. 1912.

[Seal Supreme Court, Territory of Hawaii.]

JAMES A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.

Endorsed on cover: File No. 23,236. Hawaii Territory, Supreme Court. Term No. 269. H. L. Herbert, plaintiff in error, vs. Henry Bicknell, William Henry, and William Henry, secretary of the Benton G. Mining Company. Filed June 3d, 1912. File No. 23,236.

SUPREME COURT OF THE UNITED STATES

October Term, 1915

No. 269

M. L. HERBERT, Plaintiff in Error,

vs.

HENRY BICKNELL, WILLIAM HENRY, and WILLIAM HENRY, Receivers of the Hawaii Consolidated Railway Company.

In Error to the Supreme Court of the Territory of Hawaii.

BRIEF AND ARGUMENT ON BEHALF OF M. L. HERBERT, PLAINTIFF IN ERROR.

William R. Castle,
David L. Withington,
W. A. Greenwell,
Alfred L. Castle,
For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 269

H. L. HERBERT, PLAINTIFF IN ERROR,

v.

HENRY BICKNELL, WILLIAM HENRY, AND WILLIAM HENRY, SECRETARY OF THE BENTON G. MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

Brief and Argument on Behalf of H. L. Herbert, Plaintiff in Error

STATEMENT OF THE CASE.

The plaintiff, who had a bill for dental work done for the two daughters of the defendant, presented the bill, and then, after the defendant had left the Territory of Hawaii on the 22nd day of August, 1908, and become a resident of Sydney, New South Wales, Australia, brought suit in the District Court of Honolulu, on the 30th day of June, 1909, summoning the other respondents as garnishees. The record discloses no attempt at service on the defendant; but the Supreme Court of Hawaii appears to have taken judicial

notice of the fact that after the return of service a police officer, on the 2nd day of July, 1909, attached to the return, by a separate paper, the following:

> "Due and diligent search has been made for the within named H. L. Herbert, defendant, within the district of Honolulu, city and county of Honolulu, T. H., and he cannot be found. Upon information received, said H. L. Herbert is now without the Territory of Hawaii.. I therefore served defendant herein by leaving a true and attested copy thereof at his last and usual place of abode, to wit, at Mrs. Kearns', 184 S. Hotel street, Honolulu, this 2d day of July, 1909."

On the same day hearing was had (Tr. pp. 6-7), where it appeared that the garnishees were not indebted to defendant, but to his wife. Defendant was defaulted and the garnishee ordered to pay the amount of the judgment to the plaintiff.

The defendant, some five months later, appeared specially, and this case hinges on the denial of his motion to set aside the judgment.

The questions arising are:

1. Did the court acquire any jurisdiction of the defendant or his property?

2. Was there any evidence on which the judgment could be rendered?

3. Does the Statute of Hawaii as construed by the Supreme Court of Hawaii constitute due process of law?

4. Is a service on the day of judgment on the defendant, resident of a foreign jurisdiction four thousand miles away, sufficient to give jurisdiction?

As the motion was made on the ground that the record showed a violation of the Constitution of the United States,

in that there was no due process of law in rendering the judgment, the first, third and fourth points are open in this court.

POINTS AND AUTHORITIES.

I.

The District Court of Honolulu was without jurisdiction.

The District Court of Honolulu is a court of special and limited jurisdiction, and there is no presumption in favor of that jurisdiction.

Organic Act, April 30, 1900, Sec. 81.
Revised Laws, 1905, Sec. 125, 1662-1666.
Hang Lung Kee v. Bickerton, 4 Haw. 584.

The record shows that the defendant was not served personally, that he was outside the Territorial jurisdiction, and that no attachment of his property was made. The testimony of the garnishee is of a debt due Mrs. Herbert on a sale of her shares, and that "defendant sold his shares out before."

Not having acquired jurisdiction either by personal service or by seizure of property, there was no jurisdiction to render judgment against the defendant.

Mrs. Herbert's property could not be applied to her husband's debts.

Revised Laws of Hawaii, Sec. 2256, 2251-2255.

The existence of property of the defendant within the jurisdiction, in a case like this, "is essentially necessary to the exertion of the power of the court to render a binding decree."

Pennoyer v. Neff, 95 U. S., 714.
Chase v. Wetzler, 225 U. S., 79.

II.

The Hawaiian Statute as construed by the Supreme Court of Hawaii does not provide for due process of law.

The Hawaiian court held that the place of abode referred to in Section 2114 of the Revised Laws of Hawaii is something less permanent with reference to its occupancy than a place of residence or a domicile, and that one may have such a place of abode for a limited time separate and distinct from his permanent residence; that the defendant's occupying a room at a lodging house for a month while making a business visit to Honolulu constituted that room his last and usual place of abode after he had left it; that as the proceeding is *quasi in rem*, a seizure of the property will inform him of the action, without further notice; that leaving the summons at the last and usual place of abode is a method of substituted service, but that neither notice by publication or substituted service is based on the theory that it will give actual notice, but that such notice is given to his agent, and therefore to himself if he cares to take reasonable precautions, so that the notice to the agent will reach him. In other words, the court holds that no notice other than to the garnishee is necessary.

(a) *It is only in proceedings strictly in rem that the constructive notice resulting from the seizure is sufficient. (Hollingsworth v. Barbour*, 4 Pet. 466.)

The defendant in garnishment must be notified "in time to have protected his rights" by personal service or some form of substituted service.

Chicago R. I. & P. R. Co. v. Sturm, 174 U. S., 710.

"The proper publication being made."

Harris v. Balk, 198 U. S., 215.
20 Cyc., 1033, 1048, 1054.

A fundamental condition under the 5th and 14th Amendments to the Constitution of the United States is "that there shall be notice and opportunity for hearing given the parties."

Twining v. New Jersey, 211 U. S., 78, 111.
Earle v. McVeigh, 91 U. S., 503.

(b) *A lodging house where the defendant is temporarily stopping is not a last and usual place of abode, within the meaning of the Statute.*

Fitzgerald v. Salentine, 10 Met., 436.
White v. Primm, 36 Ill., 416.
Hennings v. Cunningham (N. J.) 59 Atl., 12.
Zacharie v. Richards, 6 Mart. N. S., 467.
Wright v. Oakley, 5 Met., 400.
Craig v. Gisborne, 13 Gray, 270.
Missouri, etc., Trust Co. v. Norris, 61 Minn., 256; 63 N. W., 634.
Sturgis v. Fay, 16 Ind., 429; 79 Am. Dec., 440.
Honeycutt v. Nyquist, 12 Wy., 183; 74 Pac., 90 and cases cited.

(c) *Section 2124 is misquoted by the court. The language of the law is that "unless the defendant be an inhabitant of this Territory, or has some time resided there, and then a like copy shall be served personally upon him, or left at his last and usual place of abode."*

The provision for substituted service by leaving at the last and usual place of abode refers either to one who is an inhabitant, or is a resident at the time of service; therefore, as defendant had left the attempted service gave the court no jurisdiction.

Earle v. McVeigh, ubi supra.

III.

Notice by service on the same day does not fulfill the constitutional requirement.

United States v. Fisher, 222 U. S., 204.
Roller v. Holly, 176 U. S., 399.

Respectfully submitted,

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